U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue date: 26Feb2002

***In the Matter of*:**

CASE NO. 2001-LHC-0203
OWCP NO. 14-128609

ARTURO PEREZ,
Claimant,

vs.

EAGLE MARINE SERVICES, LTD.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,
Party in Interest.

Appearances:

Arturo Perez
P.O. Box 85074
Seattle, Washington 98145
Pro Se

John P. Hayes, Esq.
Forsberg & Umlauf, PS
900 Fourth Avenue, Suite 1700
Seattle, Washington 98164-1039
For Employer

Matthew L. Vadnal, Esq.
Office of the Solicitor
US Department of Labor
1111 3rd Avenue, Suite 845
Seattle, Washington 98101
For Director, OWCP

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act," "the Longshore Act" or "the LHWCA"), 33 U.S.C. § 901 *et seq*. A formal hearing was held on November 6, 2001, at Seattle, Washington, in which Claimant, Arturo Perez ("Claimant"), appeared *pro se*, and Employer, Eagle Marine Services, Inc. ("Employer"), and Director, Office of Workers Compensation Programs ("Director"), were represented by counsel. The following exhibits were admitted into evidence: Administrative Law Judge's Exhibits 1, 2 and 3 ("ALJX-1", "ALJX-2", and "ALJX-3")[1], Claimant's Exhibits ("CX") 1 to 3, and 5 through 14,[2] and Employer's Exhibits ("EX") 1 through 24.[3]

On January 10, 2002, Employer filed a Post-Hearing brief. ("ALJX-4"). The Director filed a Post-Hearing Brief on Jauary11, 2002, ("ALJX-5"), and Claimant filed his Post-Hearing Brief on January

---

[1] Administrative Law Judge's Exhibits were Claimant's Pre-Trial Statement ("ALJX-1"), Employer's Pre-Trial Statement ("ALJX-2") and Director's Pre-Trial Statement ("ALJX-3"). See Transcript, ("Tr.") at 208-209.

[2]The ruling on the admissibility of Claimant's Exhibit 4 was reserved for a later date. Employer requested an opportunity to have its medical expert, Dr. Wilson look at it prior to its admission. Tr.198-204. No objection was raised in Employer's Post-Trial Brief. The exhibit is therefore admitted.

[3]Employer submitted the deposition of Dr. Allan Wilson on January 10, 2002; it has been marked as EX-24 and is hereby admitted to the record. Employer's exhibits were admitted provisionally, subject to objections by Claimant, made in writing, one week from the hearing date. Tr.209-212. No objections were received by the undersigned within that time frame. Therefore, Employer's exhibits are hereby admitted without provision.

15, 2002, ("ALJX-6").

Stipulations: The parties agreed to the following stipulations:

1. The parties are subject to the Act regarding the back injury, but exclusive of the injury to Claimant's psyche;

2. Claimant and Employer were in an employer-employee relationship at the time the injury occurred;

3. The injury to Claimant's back, and alleged injury to Claimant's psyche occurred on August 15, 1998;

4. Claimant's back injury arose out of and in the course of employment;

5. Claimant filed a timely claim for compensation;

6. Employer filed timely notices of controversion, regarding Claimant's low back injury, on September 3, 1998, March 2, 1999, March 12, 1999, and September 27, 1999.

The Court accepts all of the foregoing stipulations as they are supported by substantial evidence of record. See *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

Issues in Dispute:

1. Did Claimant's injury to his psyche arise out of or in the course of employment?

2. What is the date of maximum medical improvement for
   (a) lumbar spine injury;
   (b) injury to psyche?

3. Is Claimant entitled to Section 7 benefits?

4. If Claimant prevails, is Employer responsible for payment of 14(e) penalties for the injury to Claimant's psyche?

5. What is Claimant's average weekly wage?

6. Is Employer entitled to an offset for overpayment of temporary total and partial disability benefits?

7. Is Employer entitled to Section 8(f) benefits?

SUMMARY OF DECISION

Claimant has sustained his burden of proving that his psychological injury was causally related to the August 15, 1998, accident. Claimant is therefore entitled to benefits under the Act. The date of maximum medical improvement for Claimant's back injury was April 2, 1999, however, Claimant has not reached maximum medical improvement in regards to his psychological injury. Claimant is therefore currently temporarily totally disabled. Claimant is entitled to Section 7 benefits for all medical and psychological treatment between August 15, 1998, and the present date, and continuing. However, Claimant is only entitled to temporary partial benefits for the weeks worked during this time.[4] Claimant's average weekly wage at the time of injury was $577.02, giving Claimant a compensation rate of $384.68. Employer is responsible for Section 14(e) penalties, for failure to timely controvert Claimant's psychological injury. The Court does not reach the Section 8(f) issue, as Employer has withdrawn its claim, pending a finding of permanency of Claimant's injury.

SUMMARY OF EVIDENCE

Claimant's Testimony and Medical History:

Claimant, Arturo Perez, was born May 26, 1960. He was 41 years old at the time of trial. Claimant has no formal education, but he reads. Tr.214. At the time of trial, Claimant had been living in his car. Tr.233. Claimant has worked in longshore in Seattle for four years as an unidentified casual. Unidentified casuals are the last in line for work on a given day. Tr.214. Claimant stated that he presents himself at the hiring hall and he takes whatever job is offered to him. He has no choice in the matter. Tr.176.

On August 15, 1998, Claimant was injured while working as a truck driver. According to the medical records, Claimant was hit broadside on the passenger side of his truck, causing him to be thrown out of the driver side door, landing on his back. The truck then ran over his foot. Claimant sustained a sprain/strain to his lower lumbar region. No damage was done to his foot, as Claimant was wearing steel-toed boots at the time of the accident. EX-2, p.5, CX-1, p.2. Since the accident, Claimant has seen various physicians, and been referred to pain clinics, physical therapy, and work hardening. EX-2 to EX-13.

---

[4]The weeks ending September 11, 1998, September 20, 1998, November 27, 1998, December 4, 1998, December 11, 1998, and the period between the week of December 15, 2000, to the week ending March 9, 2001.

Claimant's original treating physician, Dr. John W. Robertson, reported on March 17, 1999, that Claimant had excellent range of motion of his cervical, dorsal and lumbar spine without pain. There was a normal neurologic examination, and straight leg raising in the sitting position was negative to 90 degrees bilaterally. CX-11, p.128. Dr. Robertson recommended a physiatry evaluation by Dr. Stuart Weinstein for other treatment options, as well as an evaluation by psychiatrist, Dr. Oscar Romero.[5] Dr. Robertson stated: "[Claimant] very well may be a candidate for additional physical therapy while he is sorting out the emotional issues and he very well may be a candidate for pain for a more formal, multi-disciplinary pain clinic approach." CX-11, p.128. Claimant remained off work at that time.

On March 29, 1999, Claimant was examined by Dr. Weinstein. Dr. Weinstein found that Claimant was looking for a simple solution to his problem, and would not continue with work hardening. Dr. Weinstein recommended referring Claimant to a multidisciplinary pain management program, "but after discussing this with him, it would appear that he is not very interested in this either." EX-11, p.68.[6]

Dr. Robertson next examined Claimant after his visit with Dr. Romero. On that date, April 1, 1999, Dr. Robertson released Claimant to work on full duty, without restriction. Dr. Robertson reported that "if [Claimant] does not tolerate it, then he will go on unemployment while he is looking for other work. There are certainly no other treatment options at this point." CX-11, p.125. Claimant testified at trial that Dr. Robertson released him to work without restriction at Claimant's request. Claimant stated he could not get unemployment or find a job with light duty restrictions, and Claimant needed to work. Tr.115-116.

On June 22, 1999, Claimant was examined by Dr. Kim Wright at the Seattle Neurosurgery Clinic. Dr. Wright's impression was that Claimant had slight disc bulges, but no sign of disc herniation or nerve root impingement. Claimant's bone scan was unremarkable, as were his x-rays. Dr. Wright stated that he was "suspicious that [Claimant] may be harboring a sacroiliac joint strain injury." Dr. Wright sent Claimant to see Dr. Jennifer Carl, and to undergo a diagnostic injection to the left sacroiliac joint by Drs. Baker and Chang. CX-6, p.53.

Claimant was next examined by Dr. Steven Overman on August 9, 1999, at the behest of Dr. Wright. Dr. Overman's assessment was: 1. chronic thoracic and lumbar back pain with referral into the left SI joint but without signs of sacriliitis on exam. 2. Depression and weight gain with sleep disorder associated with chronic pain syndrome. Dr. Overman strongly recommended referral to a pain center. CX-6, p.49. Dr. Overman released Claimant to work on light duty on September 7, 1999. CX-6, p.54.

---

[5]Dr. Romero, a board-certified psychiatrist, examined Claimant on March 19, 1999. He testified, by way of deposition, on behalf of Employer.

[6]At his deposition, on October 19, 2001, Claimant testified that the reason he did not continue with the pain management programs, work hardening, and other treatment he was sent to was that he did not have insurance at the time, and could not afford to pay for them. EX-22, p.213, 218.

The last release to work issued to Claimant was signed by Dr. Ross M. Hays, at the University of Washington Medical Center, Multidisciplinary Pain Center on December 29, 2000. Dr. Hays released Claimant to work with a 15 pound weight restriction, due to his back pain. CX-8, p.60.

Claimant testified that he wants to work. He wants to be able to support himself, have a home and be happy. Tr.255. Claimant is attempting to get vocational training so that he can find work that will not have adverse effects on his back. He feels this is the only way he will be able to return to the work force. Tr.251. On cross-examination, Claimant testified that he does not want to return to longshore work because he is afraid if he reinjures himself, he will be treated with the same disrespect he is being treated with now. He does not think he will be taken care of. Tr.253-255. Claimant is also concerned about having to turn down jobs if they are too hard, considering his condition and work restrictions. He further states that at most times in the year, there are very few longshore jobs available for an unidentified casual with his restrictions. Tr.252-253.

Claimant testified that he worked as a truck driver, babysitter,[7] lasher, and four leaf driver. He denied working as a front man, sling man, a hatch tender, CFS utility man, or CFS clerk. He could not recall working in those positions. Tr.217-218. Claimant worked as an auto driver once, and he believed he had worked as a utility lift driver before. Tr.220. Claimant testified that there is nothing physically keeping him from working as a babysitter, but he cannot get that job. The job is no longer available in the port of Seattle. Tr.224-3-224. Claimant could not work as a lasher because it involves heavy lifting of metal ropes approximately 10 to 12 feet in length. Tr.224. Claimant stated that he could not drive a truck again because "I'm confused, shaking, and I don't trust to drive in the port right now. I don't want to have an accident." Tr.225. Claimant was concerned about driving due to the side effects of his medication, as well as his back injury. Tr.225.

Claimant was working two jobs at the time of the injury. After the injury, Claimant testified that he went back to work because he could not afford to stop. He finally had to because he was in pain. Tr.226-228. Claimant worked the weeks ending September 11, 1998, September 20, 1998, November 27, 1998, December 4, 1998, and December 11, 1998. CX-10E and 10F, p.106-111. On cross-examination, Claimant testified that he tried to find work as a driver. He applied for jobs but no one ever called him for an interview. He has no written proof of these attempts. Tr.243-244. Claimant worked as a driver delivering auto parts for three months between the week ending December 15, 2000, through the week ending March 9, 2001, but he quit because of the heavy lifting required. Claimant could not find another position. Tr.226, CX-10G, p.112-124. Claimant did not feel that he was hireable in his present condition Tr.250.

---

[7]Claimant described the position of babysitter as "more like securing and unsecuring the chassis and pulling out or putting on the pieces that attached them for security, the container." Tr.216.

Claimant felt responsible for his mother's death because he could not make enough money to take care of her. Tr.237. Claimant had never been an unmotivated person until this accident occurred. He testified that he has been depressed since the accident. At the time, though he did not realize that there was actually something wrong with him, or that his condition was treatable. He thought he just had to suffer through it, which is why he never told anybody about his mental condition until much later. Tr.231. Claimant testified at his deposition that he had never had any psychiatric problems prior to the accident on August 15, 1998. EX-22, p.218.

Claimant stated that he is feeling better since he has been given medication.[8] He believed the TENS unit was helping, but that the medication was helping more. Claimant insisted that he is not playing sick. He stated: "[a]nd if someone is thinking I'm playing sick, well, someone should think, too, that I play sick to let go two jobs that I had, my mother, and now I'm living in my car, in the cold, and homeless. I'm not playing sick." Tr.237. Claimant testified on cross-examination, that if Dr. Bramhall tells him that he can go back to work, he will, but he does not want to go back to longshore. Tr.253.

Psychological Evidence

Dr. S. Jeanne Bramhall:

Dr. S. Jeanne Bramhall, a board certified psychiatrist, testified on behalf of Claimant. See, Curriculum Vitae of Dr. Bramhall, CX-1, p.5-6. Dr. Bramhall began treating Claimant in April 2001. Tr.44. As of the date of trial, Dr. Bramhall had been treating Claimant for seven months. She saw Claimant twice a month, for 20-30 minutes at a time. Tr.53.

Dr. Bramhall read the deposition testimony of Dr. Romero prior to testifying. Dr. Bramhall opined that Dr. Romero's diagnosis of Claimant was fairly accurate. She agreed with most of what he said. She disputed, however, Dr. Romero's findings that Claimant's depression did not stem from the August 15, 1998, accident. Dr. Bramhall felt that it clearly did. Tr.47-48.

Dr. Bramhall agreed with Dr. Romero that Claimant suffers from something similar to a bipolar-2 disorder, but that he does not exactly meet the criteria laid out in the DSM-IV[9] for that condition. Dr. Bramhall classified this as a bipolar spectrum or soft-bipolar disorder.[10] Tr.65. She stated that historically,

---

[8]The medication referred to was Trileptil, Neurontin, and lithium carbonate. See, fn.9-11.

[9]"DSM-IV" is the acronym for the Diagnostic and Statistical Manual of Mental Disorders, fourth edition.

[10]Dr. Bramhall based this diagnosis on the work of Dr. Post and Dr. Akiskal at the National Institute for Mental Health ("NIMH"). Bipolar spectrum, or soft-bipolar disorder describes someone

Claimant was a very high energy person. Over most of his life, Claimant worked two jobs to support his family. He typically worked 18-hour shifts. Dr. Bramhall opined that individuals who have this type of temperament have a propensity to become depressed. Tr.46-47. Dr. Bramhall continued that after coming to know Claimant over seven months, she could find no evidence that Claimant had ever suffered from an incident of depression prior to the injury. Until Claimant was injured on August 15, 1998, he was a very high energy, high functioning individual. Tr.47. He began having panic attacks, depression and insomnia about a year after the accident. Claimant had never experienced any of these symptoms previously. Tr.90. The injury caused him to become depressed. Tr.47.

On cross-examination, Dr. Bramhall testified that she does not rely on the DSM-IV, she relies on taking a longitudinal history from patients. Her reasoning was that "the DSM-IV was written ten years ago, and there's a lot of research into mood disorders and bipolar disorders that is not reflected in the DSM-IV." Claimant's diagnosis is not in the DSM-IV. Tr.60. Dr. Bramhall stated that she did not use the DSM-IV to make her diagnosis, she used it for billing purposes. Tr.61. Dr. Bramhall admitted that she has often misrepresented a diagnosis, by using the terms in the DSM-IV. Dr. Bramhall explained that she uses the DSM-IV terms so that others reading her reports have some understanding of what it is she is talking about. Tr.64. Dr. Bramhall testified that she follows the practice guidelines and protocol for depression and bipolar disorders, issued by the American Psychiatric Association, which update the ten-year-old DSM-IV. Tr.70.

Dr. Bramhall stated on cross-examination that bipolar disorder is both a congenital and acquired condition. It cannot result from a traumatic event. Tr.66. Her diagnosis of bipolar disorder has nothing to do with the August 15, 1998, injury, but Claimant's depression was caused by the injury. Claimant's accident and his ensuing inability to work was very traumatic for him. "That caused him to become quite depressed." Tr.76. Dr. Bramhall based her diagnosis on Claimant's reporting to her as well as on Dr. Romero's report. Dr. Romero did not document any prior depression in Claimant's history either. Tr.66-67.

Dr. Bramhall testified that Claimant may have post-traumatic stress disorder, but that would be a secondary diagnosis. Her primary diagnosis was a bipolar disorder with depression, precipitated by the injury. Tr.49. On cross-examination, Dr. Bramhall ruled out post-traumatic stress disorder altogether. Tr.68.

---

with a hyperthymic temperament. This is a very high energy individual who, throughout their life, experiences episodes of depression. Despite high energy, these people do not have a five-day episode in their history of hypomania, which is necessary for a diagnosis of bipolar-2 disorder. Dr. Bramhall defines hypomaina as rapid speech, impaired judgment, impaired ability to communicate, little need for sleep, but all without clear symptoms of mania. Without this hypomanic episode, bipolar spectrum, or soft-bipolar disorder is the proper diagnosis. Tr.69.

As of the date of trial, Dr. Bramhall was of the opinion that Claimant was temporarily totally disabled. Tr.49-50. She felt that at the time, Claimant was recovering from depression and back pain, and was consistently improving. However, Claimant still had difficulty maintaining his sleep pattern. He had difficulty maintaining a stable mood. His ability to focus and concentrate, and use "higher executive functions" was still impaired. Tr.51. Dr. Bramhall stated: "I think that when somebody has severe insomnia and they're subject to periods of depression, the hardest thing for them is attending work regularly. I think right now he would have some difficulty with regular work attendance." Dr. Bramhall continued that Claimant would have difficulty during the day with concentration. He may be able to do so for a few hours, but "then he would not be able to satisfy an employer with his ability to concentrate and perform." Tr.52.

On cross-examination, Dr. Bramhall was asked if Claimant's ability to organize his exhibits appears to be the work of someone suffering from impaired memory or concentration, or the work of someone with above-average intelligence, with good concentration and capture of memory. Dr. Bramhall responded by stating that Claimant has benefitted from seven months of treatment and medication, and is still improving. Tr.77.

Dr. Bramhall was not surprised to hear that Claimant was working full-time for three months in the beginning of 2001. It was her experience that patients with bipolar disorder have periods when they can function. "They just have a great deal of difficulty with longevity. It's hard for them to function over time." Tr.79. Dr. Bramhall did not think this information was a significant factor in determining whether Claimant was disabled and unemployable. Dr. Bramhall believed Claimant quit because he was extremely depressed. Tr.81. She opined that Claimant wants very badly to work. "He would do anything to be able to work." Tr.92.

Dr. Bramhall testified that Claimant is presently taking lithium carbonate,[11] Trileptal,[12] and Neurontin[13] for his depression, as well as his pain. She opined that the Trileptal in some people causes some concentration and word finding problems, but that so far Claimant did not seem to have much problem in this area. She continued that Claimant has not been taxed in this area, such as learning a new job or going to school. She was unsure if the Trileptal would affect Claimant's concentration and word finding under such conditions. Dr. Bramhall testified that lithium causes tremors. She has noticed Claimant having tremors. Tr.54.

Dr. Bramhall testified that she would expect Claimant could be released to work full-time, within the next six to eight weeks. Tr.82. She feels that his condition is treatable. He may be able to work in six to eight weeks, but he cannot stop his medication then. Dr. Bramhall opined that perhaps eventually,

---

[11]An antimanic medication. EX-23, p.23-24.

[12]An anticonvulsant. www.fda.gov.

[13]An anticonvulsant, also used to treat chronic neuropathic pain. www.pslgroup.com.

Claimant can stop, but it is her practice to keep patients on medication until they have been in remission for eight months. She will then gradually taper the patient off the medication. Tr.83-84. She cannot, however, predict the outcome in Claimant's case at this time. Tr.85.

Dr. Oscar H. Romero:

Dr. Oscar H. Romero testified on behalf of Employer, by way of deposition, on October 19, 2001. Dr. Romero is a board certified psychiatrist. See, Curriculum Vitae of Dr. Romero, EX-23, p.290a-290b. Dr. Romero examined Claimant on March 19, 1999. Dr. Romero testified that Claimant was lucid and able to present and discuss his symptoms at that time. Dr. Romero diagnosed Claimant with bipolar disorder NOS.[14] Dr. Romero stated that Claimant did not meet the DSM-IV criteria for either bipolar disorder I or II, but he presented with symptoms similar to those two diagnoses.[15] EX-23, p.244.

At the time of the examination, Dr. Romero opined that Claimant was exaggerating his limitations when he described them to Dr. Romero. Dr. Romero found no impairment of memory, concentration or attention during the examination, although Claimant described these symptoms to him. Dr.Romero testified that he would not be able to separate this behavior from Claimant's bipolar disorder. This behavior may be conscious or unconscious, but it is probably related to Claimant's bipolar disorder. EX-23, p.247. Dr. Romero related this exaggeration to Claimant's poor judgment and insight, which he documented in his report. Dr. Romero stated that Claimant may perceive his limitations as being worse than they actually are. EX-23, p.247.

When asked why Claimant is still complaining of pain and cannot work, Dr. Romero explained that a person with bipolar disorder may perceive the environment around him as being more intense than it actually is. They perceive physical symptoms and complaints as being worse than they are. This would explain Claimant's subjective feelings that he experiences pain and that he cannot work. EX-23, p.247. Dr. Romero stated that Claimant's continuous requests for diagnostic testing, to find some explanation for his pain, is typical behavior for someone suffering from bipolar disorder. EX-23, p.247.

Dr. Romero noticed that Claimant's work history was rich in different jobs over a relatively short period of time. He stated that this was very common to see in a person with bipolar disorder. "They get disappointed and their expectations are very high in the job and they move to another job and experiment with another, and that can happen." Dr. Romero opined that Claimant taking a delivery job for three months in 2001, and then quitting, fits within this pattern of behavior. EX-23, p.248.

---

[14]Bipolar disorder not otherwise specified.

[15]Dr. Romero explained bipolar disorder as a physiological condition, due to a disturbance in the neurotransmitters in the synapses of the neurons. These neurotransmitters are dopamine, serotonin, and epinephrine. There is an imbalance in the neurochemicals that can be corrected by proper medications. EX-23, p.245.

Dr. Romero opined that the depressive part of Claimant's disorder will recur. With proper medication, Claimant would be able to function in a work environment. He suggested an antimanic medication, an antidepressant, and psychotherapy "to help [him] adjust to [his] condition and develop more insight into the acceptance of the illness. . ." In other words, Claimant needs to learn how to self-manage his illness. EX-23, p.248.

Dr. Romero testified that it is normal for someone with bipolar disorder to terminate treatment for physical problems. They do so because they are very sensitive and do not relate to demands placed on them by the treatment. He continued that "they expect a cure, a very fast cure, and they get disappointed very rapidly." They will remove themselves from treatment abruptly, as Claimant did on several occasions. EX-23, p.249.

Dr. Romero testified that Claimant had complained of anxiety and nervousness that comes and goes. He opined that it is difficult for a patient to report symptoms because they are not sophisticated medically and they express using the terminology available to them. "So they can talk about anxiety and nervousness when referring to what we don't refer to exactly as anxiety and nervousness, but refer to these mood swings that are typical of the bipolar conditions." EX-23, p.249.

Dr. Romero felt Claimant's disorder was prohibiting his ability to work. He explained:

> because of the exaggeration of ideas, his impairment or belief or feeling that he was more impaired than he actually was as a result of the bipolar disorder, and he was not willing to go to work or didn't feel capable of going back to work. So I felt that to some extent those symptoms may be inhibiting his ability. EX-23, p.250.

Dr. Romero opined that with medication, and psychotherapy to facilitate Claimant's capacity to communicate with people and establish more steady relationships, Claimant should eventually be able to function in the work world. EX-23, p.250. Dr. Romero did not, however, feel that Claimant's psychological state had anything to do with the industrial injury. EX-23, p.250.

Medical Evidence

Dr. Nancy G. Worsham:

Dr. Nancy G. Worsham, an expert in physical medicine, testified on behalf of Claimant. Tr.96-

98.[16] Dr. Worsham had been treating Claimant since May 1, 2001. Claimant was referred to Dr. Worsham by Dr. Bramhall. Dr. Worsham sees Claimant once or twice a month. Tr.99. In her last report, dated October 1, 2001, Dr. Worsham stated:

> [Claimant's] thoracic and low back pain are much improved since his bipolar illness has been treated by Dr. Bramhall, however I think it unlikely at this point that he is going to return to heavy labor. I think if he felt he could in any way do so he would have already done it as he has been desperately poor and all of his work has been heavy. He will come back and see me on an as-needed basis. CX-2, p.25.

Dr. Worsham did not feel Claimant would benefit from further treatment for his back, as long as he uses his TENS unit and continues to exercise and walk. Tr.110. Dr. Worsham opined that Claimant reached permanent and stationary status as of October 1, 2001. Tr.111-112.

Dr. Worsham opined that because of his back pain, Claimant would be much more likely to succeed in maintaining employment if he were to do light work. Tr.103. Dr. Worsham testified that Claimant could occasionally lift up to 20 pounds, but not frequently. He could lft 40 pounds once or twice a day, and never lift 50 pounds. Claimant needs to change positions frequently, because of the tight muscles in his back He could work an 8 hour day if he alternated sitting, standing and walking. He could stand a total of 2 hours a day, but for no more than a half hour at a time. Claimant could walk 6 hours a day, with a break every hour. He could sit for 2-3 hours a day in half-hour intervals, hour intervals at a maximum. Clamant should not engage in bending, but he could squat. Claimant has no real upper body restrictions. Tr.104-109.

On cross-examination, Dr. Worsham testified that prior to treating Claimant, it was her medical opinion that his condition was not yet permanent and stationary. "[E]verybody keeps offering him more treatment. As far as all the records I've seen, people are offering him treating [sic]. As of March of 2001, they wanted to treat him." Tr.114. Dr. Worsham reviewed all of Claimant's x-rays, MRIs, CT scans, and bone scans. She agreed that Claimant has had a very comprehensive work-up. Dr. Worsham agreed that the last time she saw Claimant, on October 1, 2001, his condition was unremarkable. Tr.118-119.

Dr. Worsham agreed that a lumbar sprain or strain should heal within 90-120 days. Tr.121. When asked why then, Claimant has not returned to work well after the 90-120 day healing period had ended, Dr. Worsham responded that she does not have a good explanation. Many patients have chronic pain after their lumbo-sacral sprains have resolved. She felt that Claimant's depression had a huge impact on his ability to work. Tr.122-123. She further testified that from a musculo-skeletal, objective point of view,

---

[16]A Curriculum Vitae was to be submitted at a later date, to Counsel for Employer and forwarded to the undersigned. At the time of writing, none has been received. Tr.94-95.

there is no reason why Claimant should not have returned to work long ago. Tr.123. Dr. Worsham opined that Claimant's continuing pain was the result of an interaction of emotions and muscles. The two are not disconnected, and cannot be focused on separately. She suspects that without the emotional problem, Claimant may have been back to work. Tr.124.

Dr. Worsham opined that if there were work available within the physical restrictions she described, Claimant could work. Claimant is capable of light work. Tr.131. Dr. Worsham was not familiar with the longshore jobs on the waterfront. She was unable to give an opinion as to which jobs Claimant would be capable of performing. She was under the impression that the majority of longshore jobs were heavy work. Tr.137-138.

Dr. Allan R.Wilson:

Dr. Allan R. Wilson, a board certified orthopedic surgeon, testified on behalf of Employer, by way of deposition on December 1, 2001. See, Curriculum Vitae of Dr. Wilson, EX-24, p.318. Dr. Wilson examined Claimant on October 5, 2001. He reviewed Claimant's medical records prior to the examination. Dr. Wilson gave a general diagnosis of Claimant as entirely unremarkable. It was essentially within normal limits in all respects. EX-24, p.296.

Dr. Wilson elaborated that Claimant had normal neck movement, normal mid, lower back movement. Claimant's neuromuscular exam was normal. Dr. Wilson did report that the diagnostic studies showed some degenerative changes at the L3-4 level. This was due to the normal ageing process, probably early signs of wear and tear that is normally expected and not, in his opinion, due to the August 15, 1998, accident. EX-24, p.298-299.

Dr. Wilson opined that Claimant probably sustained a lumbar strain injury in the August 15, 1998, accident, but by October 5, 2001, Claimant was asymptomatic. Dr. Wilson explained that a lumbar strain is a soft-tissue injury to the lower back. It can involve muscular tissues that are stretched, and can involve ligaments as well. EX-23, p.297. Dr. Wilson stated that these injuries usually heal within 90-120 days. EX-24, p.298. He opined that Claimant should have been permanent and stationary within this time frame. EX-24, p.301.

Dr. Wilson testified that a TENS unit was unnecessary in Claimant's case. Dr. Wilson feels this is only necessary in cases of major back surgery, and extraordinary pain. He stated that people get dependant on such devices, more for psychosocial reasons than physiological. He stated that if used, there is only a very short-term benefit to using a TENS unit. Beyond that, it would be considered a palliative rather than curative form of treatment. EX-24, p.305-307. Dr. Wilson used to prescribe TENS units in his practice, but does not any longer. EX-24, p.306.

Dr. Wilson opined that, at least initially, Claimant can work 8-10 hours a day, with 5 minute breaks each hour, and he would start Claimant out at lifting 25 lbs. EX-24, p.299. Dr. Wilson opined that it might be appropriate to try at least initially, to start Claimant out on light duty, and then ease him back into heavier work. He felt this would give Claimant an opportunity to get his confidence back, get his situation in better control, so that he could eventually return to work without restriction. EX-24, p.300.

Dr. Wilson reviewed a series of job descriptions and gave his opinion as to whether Claimant was capable of performing those duties, based on Dr. Wilson's restrictions. Dr. Wilson testified that Claimant could work as a bull forklift driver-dock, a basic clerk-ship, dock supervisor, basic clerk-dock, container ship, gate clerk, sticker man/dock man, and tractor-semi-ship. EX-24, p.302-303. Dr. Wilson stated that even changing the restrictions to those Dr. Worsham recommended, Claimant would still be capable of functioning in all the jobs he previously listed. EX-24, p.312.

Dr. Wilson gave his opinions on the physiological effects of bipolar disorder on the musculoskeletal system. In his opinion, such a disorder would not have any effect physically. He further opined that bipolar disorder has never been caused by a traumatic injury. Dr. Wilson opined that simple depression, a depressive type reaction could occur as the result of a traumatic injury. He did not, however, think that in this case, Claimant's depression resulted from his traumatic injury. Dr. Wilson admitted that this is not his area of expertise. EX-24, p.303-305.

Vocational Evidence

Paul Tomita:

Mr. Paul Tomita, an expert in vocational counseling, testified on behalf of Employer. See, Curriculum Vitae of Mr. Tomita, EX-21, p.182a-182b. Tr.141. Mr. Tomita reviewed the medical report of Dr. Wilson and Claimant's medical records, as well as documents regarding wages and hours by occupation from the Pacific Maritime Association ("PMA"). Tr.143. Based on Dr. Wilson's restrictions, Mr. Tomita reviewed the physical demands of each longshore occupation which Claimant had worked previously, as well as any other occupation Mr. Tomita felt Claimant was capable of performing. EX-20, p.171-177. Based on Dr. Wilson's restrictions, Claimant was capable of performing all the jobs listed in Mr. Tomita's report.[17]

[17]These are: bull/forklift driver-dock , basic clerk-ship, dock supervisor, basic clerk-dock, gate clerk, stickerman/dockman, tractor semi-ship, lasher, frontman/slingman, holdman, hatch tender, tractor semi-dock, lift truck-heavy, CFS utility man, CFS clerk, auto driver, lift truck operator, utility lift driver. Mr. Tomita testified that Claimant was capable of performing 12 jobs. He referred to both EX-20, p. 171-177, and EX-21, p.181. These listings total 19 jobs. It is unclear which 12 jobs Mr. Tomita was referring to.

Mr. Tomita opined that there was work available to casual workers within these job categories, during 1999 and 2000. Mr. Tomita based this opinion on the PMA reports for total hours worked. Mr. Tomita stated in his report that Claimant can do all of the twelve jobs listed on page three of his report, "depending on he being an A, B, or Casual longshoreman." EX-21, p.182. Based on his review of the records, Mr. Tomita stated that if Claimant had presented himself as a casual in April 1999, he could have worked any one of these twelve jobs. Tr.150. Mr. Tomita opined that Claimant could have earned more than $20,000.00 a year if he had presented himself for work during 1999 and 2000. Tr.151.

Using Dr. Worsham's restrictions, Mr. Tomita stated that Claimant could perform the jobs of forklift driver-dock,[18] basic clerk-ship, dock clerk, gate clerk, dock supervisor, day clerk, stickerman/dockman. Using Dr. Worsham's restrictions, Mr. Tomita opined that Claimant could earn over $20,000.00, based on the hours worked and available to casuals in 1999 and 2000. Tr.151-158. On cross-examination, Mr. Tomita stated that Claimant would not be qualified to work as dock supervisor, as he has never performed that job before. Tr.169-170. Mr. Tomita was not aware that Claimant could speak English at the time he prepared his report. Tr.170.

On cross-examination, Mr. Tomita was asked if he knew what the term "unidentified casual" meant. He stated that they are "the lowest." Tr.162. An unidentified casual is dispatched by the Department of Employment. Identified casuals, "the union knows about them." Mr. Tomita was unaware of the discrepancy between hours worked by unidentified and identified casuals. Tr.167-168. Mr. Tomita explained that when a worker reports to the hiring hall and is offered a job, if he cannot perform it, he must turn it down. He is then "finished for the day." Tr.178. Casuals are offered jobs last. Mr. Tomita stated:

> It is incumbent that the person, if you're a casual, you show up every day that you can. And you say 'Hey, I could do this job.' And if [he] gets, you know, known, 'Hey this guy is good. You know, he's a casual, he's not registered. This guy can do his job.' Then your name or your reputation gets around and eventually the idea is to get you on as a B registered. Tr.179-180.

Mr. Tomita stated that if an unidentified casual was available for work five or seven out of seven days, they could earn $20,000.00 a year. Tr.162. On cross-examination, Mr. Tomita agreed that working as a casual is "chancy." Tr.182. Mr. Tomita provided the total hours worked during the years in question by all casuals. He did not know how many individuals were applying for those jobs, or how many were actually given work or turned away. Tr.162-164.

---

[18]Mr. Tomita did not think Claimant would be able to take a break every 30 minutes while performing this position. Tr.153.

ANALYSIS

I. Causation

As a result of the accident of August 15, 1998, Claimant alleges he sustained injuries to his low back, and to his psyche. Employer stipulated to soft tissue injuries to Claimant's low back. Thus, there is no need for the undersigned to discuss section 20(a) in regard to the back injury.

Claimant asserts that his current depressive cycle was caused by the August 15, 1998, accident. He alleges that, although his bi-polar disorder was a pre-existing condition, this condition was aggravated by the accident, and he is thus entitled to benefits under the Act. Employer asserts that bi-polar disorder is a condition that cannot be brought on by any type of traumatic event, and is thus a pre-existing condition. Employer further argues that Claimant's depressive cycle is merely part of his condition, and not at all industrially related. The accident, in no way, added to his condition, and, therefore, Employer is not responsible for paying benefits to Claimant for this injury.

An injury compensable under the Act must arise out of and in the course of employment. Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615, 102 S.Ct. 1312, 1317 (1982) ("The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.") However, a claimant is entitled to invoke the presumption if he presents at least "*some* evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990).

Claimant has put forth sufficient evidence to establish a *prima facie* case of compensability. It is uncontroverted that Claimant was injured in an industrial accident on August 15, 1998. Claimant's treating psychiatrist, Dr. Bramhall testified that Claimant suffers from a bipolar spectrum, or soft bipolar disorder. She further testified that Claimant's current depressive cycle was caused by the industrial accident. This evidence is clearly "some evidence tending to establish" that Claimant suffered some harm or pain, and that an accident occurred that could have caused the harm or pain. I therefore find that Claimant has presented evidence sufficient to invoke the section 20(a) presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the

claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). See also *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

Employer is able to carry its burden to rebut Claimant's *prima facie* case. Dr. Romero testified in his deposition that Claimant's condition could not have been the result of the industrial accident. He asserted that Claimant suffers from bipolar disorder NOS, a congenital, and acquired disorder. This disorder cannot occur as the result of trauma, and did not occur as the result of Claimant's industrial injury. Based on the foregoing, the undersigned finds that Employer has rebutted Claimant's *prima facie* case by substantial evidence.

The next step in the analysis is to weigh the evidence as a whole. Claimant has the burden of proof to show by a preponderance of the evidence that his injury was caused by the industrial accident he suffered on August 15, 1998. The undersigned finds that he has carried that burden.

The undersigned finds Claimant to be a credible witness. Claimant testified that he had never experienced any type of depression prior to the August 15, 1998, accident. Up until that time, Claimant had been working two jobs, sometimes working 18 hours a day. His past history is devoid of any indication that Claimant has had a prior depressive cycle.[19] Claimant has been working in longshore in Seattle for five years, without incident. He held a full-time construction job, along with his part-time longshore work, and has not previously needed to collect unemployment compensation due to an inability to work because of depression. Since the accident, Claimant has been unable to maintain any type of stability in his life. He was unable to continue working on two occasions, due to his pain and depression. Claimant has been residing in his car since July, 2001. Claimant reported to Dr. Worsham that the reason for this decision was that Claimant was determined to pay his credit card bills, and could not afford to pay rent as well. See, CX-2, p.14, 21, 23. This evidences an individual who is determined to follow through with his obligations, regardless of the personal sacrifices. This is not the character of a person who is malingering. Claimant's objective behavior, prior to and following his accident, corroborates the diagnoses of both Dr. Bramhall and Dr. Romero.

[19]There was some testimony regarding a driving under the influence conviction in 1990, as well as a possible alcohol problem related to this. The undersigned does not find much merit to this argument, as there is no evidence that this was nothing more than an isolated incident, unrelated to Claimant's bipolar disorder. Tr.60, 86-88. There is insufficient evidence to convince this Court that Claimant has a current alcohol problem.

Further, Claimant's treating psychiatrist, Dr. Bramhall, believes that his depressive cycle was directly caused by the August 15, 1998, accident. Although Dr. Romero disagrees with Dr. Bramhall's conclusions, both psychiatrist's observations and reasoning for their respective diagnoses do not differ significantly. Both credit Claimant's psychological condition for his erratic behavior. When considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). The opinion of a treating doctor is given deference because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987) (citations omitted). In this instance, the undersigned gives more credence to Claimant's treating psychiatrist, Dr. Bramhall, than that of Employer's expert, Dr. Romero. Dr. Romero examined Claimant on one occasion, three years ago. His diagnosis and the reasoning behind it do not correlate with his conclusion that Claimant's injury was not causally related to the industrial accident. Dr. Bramhall, in contrast, has examined Claimant approximately 14 times over the past year. Her diagnosis is well-reasoned and is corroborated by Claimant's objective behavior.

Dr. Romero examined Claimant once, on March 19, 1999. He did not recommend treatment, nor did he prescribe any medication for Claimant's diagnosed bipolar disorder. Dr. Romero merely submitted his report to Employer's claims manager, stating that Claimant's depression was not industrially related. Dr. Romero's priorities were to report to Employer, not to treat Claimant. Dr. Romero's opinion is taken with this in mind.

Dr. Romero's reasoning for his diagnosis of Claimant's condition supports a finding that his psychological injury is industrially related. Dr. Romero testified that all of Claimant's behavior since the time of his accident, can be causally linked to his psychological condition. Claimant has exaggerated his physical complaints, which is normal for one who suffers from bipolar disorder. Claimant has discontinued treatment in frustration, as is normal for someone who suffers from bipolar disorder. Dr. Romero admitted that Claimant's condition was inhibiting his ability to work. Dr. Romero did not document any prior incident of depression in Claimant's history. He gave no explanation for Claimant suddenly being overcome with depression such that he cannot maintain a job. Dr. Romero merely stated that bipolar disorder is not caused by a traumatic injury, and therefore Claimant's condition is not industrially related. Dr. Romero's reasoning and his conclusion conflict.

In contrast, Dr. Bramhall testified that, based on Claimant's behavior both prior to and following the industrial accident, it is clear the his depression was brought on by his injury. Claimant became depressed when he could not support himself, and could not work at the capacity he was accustomed to. This was the first time Claimant had ever experienced a depressive cycle. Prior to the accident, Claimant had lived in a continual manic stage. He worked two jobs, sometimes as much as 18 hours a day. On August 15, 1998, Claimant was injured, and from that point on, he fell into a depression that prevented him from recovering from his injury. Dr. Bramhall logically linked this depression to the industrial accident.

Employer argued during trial, and again in it's Post-Trial Brief, that the Court should disregard Dr. Bramhall's testimony *in toto.* Tr.63, ALJX-4, p.18. Employer argues that Dr. Bramhall admitted that she regularly misrepresents patients' diagnoses, and is therefore not a credible witness. The undersigned finds this argument has no merit. Employer takes Dr. Bramhall's statement out of context. Dr. Bramhall explained that she uses the language in the DSM-IV when writing to lay people regarding a patient's psychological condition. She testified that the DSM-IV is an out-of-date "Chinese menu." Tr.71. Doctors within the profession have progressed beyond the 10-year-old DSM-IV, but the courts, and insurance industry still rely on it. Dr. Bramhall diagnoses her patients using the American Psychiatric Association's practice guidelines and protocols for depression and for bipolar disorders that update the DSM-IV.[20] Dr. Bramhall may not have been a well-practiced expert witness, but her testimony was honest, well-reasoned, and supported by Claimant's objective behavior.

The undersigned therefore finds that Claimant's treating psychiatrist, Dr. Bramhall is more persuasive than Dr. Romero, Employer's expert, and thus finds that Claimant's depression was caused by the August 15, 1998 industrial accident.

An LHWCA employer generally takes his employee as he finds him. *See Pacific Employers' Ins. Co. v. Pillsbury*, 61 F.2d 101, 103 (9th Cir. 1932), ("The employer accepts the employee subject to physical disabilities, which may make the latter more susceptible to injury than would be a stronger or more robust person. . ."). Thus, the focus should be on the ultimate injury, not a claimant's pre-existing condition. In this case, the injury for which recovery is sought is Claimant's depression, not the underlying bipolar disorder.

The "aggravation rule" provides that where an employment injury aggravates, accelerates or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. See *Port of Portland v. Director, OWCP (Ronne),* 932 F.2d 836 (9th Cir. 1991) (citing *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812, 814-15, (9th Cir. 1966)). The Ninth Circuit has held that this doctrine does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying impairment. See *Port of Portland,* 932 F.2d at 839 (citing *Independent Stevedore Co.,* 357 F.2d at 815). The *Port of Portland* court further opined that if a claimant's disability is partially related to "a non-employment condition, he is not required to prove that his disabilities combined in more than an additive way to warrant compensation for the resulting overall impairment." *Id.* (citing *Strachan Shipping Co. v. Nash,* 782 F.2d 513, 516 n.5 (5th Cir. 1986)); *Newport News Shipbuilding and Dry Dock Co. v. Fishel,* 694 F.2d 327, 328-29 (4th Cir. 1982) (claimant awarded full 31.25% hearing loss without need to determine whether 5.95% current work-related loss worsened or affected pre-employment 25.3% loss).

---

[20]The Court notes that in 2000, the American Psychiatric Association released the DSM-IV-TR, a text revision of the original DSM-IV.

Claimant suffered from a pre-existing bipolar disorder. Until the industrial accident on August 15, 1998, Claimant had never experienced a depressive cycle. As discussed fully in the above analysis, Claimant's condition was aggravated by the industrial accident, causing Claimant's depression, and ensuing inability to work.

In sum, the undersigned finds that Claimant's depression was caused by the August 15, 1998, industrial accident. Claimant is therefore entitled to compensation under the Act.

II. Extent of Temporary Total Disability

The burden of proving the nature and extent of disability rests with the claimant. *Trask v. Lockheed Shipbuilding Constr. Co.,* 17 BRBS 56, 58 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (partial or total). The Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, the claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *Sproull v. Stevedoring Service of America,* 25 BRBS 100, 110 (1991). Thus, a disability requires a causal connection between a worker's physical injury and his inability to obtain work. If the claimant shows he cannot return to his prior job, it is the employer's burden to show that suitable alternate employment exists which he can perform. Under this standard, a claimant may be found to have sustained no loss, a total loss or a partial loss of his wage-earning capacity.

Employer argues that Claimant's back injury reached maximum medical improvement as of April 2, 1999, the date Dr. Robertson released Claimant to work without restriction. Claimant's back injury was merely a sprain/strain, which should have healed within 90-120 days.

Claimant argues he remains temporarily totally disabled after the August 15, 1998, accident. Dr. Bramhall continues to treat Claimant for his psychological injury and does not feel he has yet reached the point of maximum medical improvement, although Dr. Bramhall is confident that Claimant could reach maximum medical improvement in the near future. Dr. Worsham feels that Claimant has reached maximum medical improvement in regards to his back injury, as of October 1, 2001.

Claimant's psychological injury, as discussed in the analysis above, has not yet reached maximum medical improvement. According to the testimony of Dr. Bramhall, Claimant is unable to maintain a regular sleep pattern and has difficulty with concentration, both affecting Claimant's ability to work. Dr. Romero was also of the opinion that Claimant's condition affected his ability to work, although to a lesser extent. The undersigned accepts the opinions of Drs. Bramhall and Romero, and finds that Claimant remains temporarily totally disabled.

In regards to Claimant's low back injury, the Court finds that this was a soft tissue injury and was fully healed by April 1, 1999, when Dr. Robertson released Claimant to work without restriction. Both Dr.

Wilson and Dr. Worsham agree that such injury usually heals within 90-120 days. The medical records following that date indicate that none of Claimant's physicians could find a reasonable explanation for his continuing pain, although they continued to offer treatment. Both Dr. Romero and Dr. Bramhall agree that an individual suffering from a bipolar disorder has a higher sensitivity and therefore a tendency to exaggerate symptoms. The undersigned therefore finds that Claimant's low back strain/sprain was fully healed as of Dr. Robertson's release to work date of April 2, 1999, but his psychological injury caused him to remain temporarily totally disabled after that date.

There were however, periods when Claimant attempted to return to work. The dates for these periods are as follows: the weeks ending September 11, 1998, September 20, 1998,[21] November 27, 1998, December 4, 1998, December 11, 1998, and the period between the week of December 15, 2000, through the week ending March 9, 2001. See, CX-10E, F and G, p.106-124. Claimant was therefore temporarily partially disabled during these periods and is entitled to benefits calculated accordingly.

III. Section 7 Benefits

Section 7(a) of the Act, 33 U.S.C. §.907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require."

Section 7 requires the employer to furnish the injured employee with medical care that is reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The claimant has the burden of proof to show that the medical services are related to the compensable injury, *Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981), and are reasonable and necessary. The claimant is not aided by the section 20(a) presumption, which applies solely to the issue of compensability. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112, 114 (1996); *see also Buchanan v. International Transportation Services*, 31 BRBS 81, 84 (1997). The claimant establishes a *prima facie* case when a licensed physician states that the treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984).

Claimant argues that Employer is liable for all outstanding medical bills of Dr.Bramhall, and Dr. Worsham, as well as any reasonable and necessary medical treatment for his August 15, 1998, industrial injury, including diagnostic tests and all referrals. When a claimant's treating physician makes a referral to a specialist, the employer's consent is not required. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992).

---

[21]Claimant submitted pay stubs from two employers for the week of September 20, 1998. PMA listed the week ending date as September 18th, whereas Hensel Phelps listed the ending date as September 20, 1998. CX-10E and F, p.106-111.

As Claimant's psychological injury was a result of the August 15, 1998, industrial accident, Claimant is entitled to Section 7 benefits for all treatment related to this injury. Further, Claimant's psychological condition resulted in continued treatment for Claimant's back injury after he had reached maximum medical improvement. Claimant's medical records indicate that his physicians continued to search for a treatment method to alleviate Claimant's back pain, even after his injury should have been fully healed. It was Claimant's depression and his bipolar disorder that caused Claimant to continue to experience these symptoms. The undersigned therefore finds that Employer is responsible for paying for all medical treatment received by Claimant from August 15, 1998, and continuing.

In addition, Employer is liable for any interest which has accrued from the date payment was due until the date of actual payment. See *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991)(interest may be assessed against an employer on overdue medical expenses, whether reimbursement is owed to the provider or to the employee).

Based on the foregoing, the undersigned finds that Employer is responsible for the outstanding medical bills reasonably associated with the services rendered by Drs. Bramhall and Worsham, plus interest at the rate specified in the applicable regulations. The Court further finds that Employer is responsible for all unpaid bills to all of Claimant's physicians, for services rendered between April 3, 1999, and continuing, as the evidence shows Claimant's injury at issue was on a industrial basis.

IV. Section 14(e) Penalties and Interest

Claimant asserts that he is entitled to a penalty pursuant to section 14(e) based on Employer's failure to pay Claimant benefits or controvert Claimant's right to benefits after he filed his claim for compensation for his psychological injury.

Failure to begin compensation payments or file a notice of controversion within twenty-eight days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to 10% of the overdue compensation. The first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. § 912(d), or after the employer has knowledge of the injury. 33 U.S.C. § 914(b); *Universal Terminal and Stevedoring Corp. v. Parker,* 587 F.2d 608 (3rd Cir. 1978). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. § 914(d); see also *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). The determination of whether an employer has knowledge of the injury is a question of fact and is assessed in the same manner as determining knowledge under Section 12(d). *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

A close scrutiny of the records reveals that Employer failed to controvert Claimant's psychological injury until September 27, 1999. On March 3, 1999, Dr. Robertson reported his intention to refer Claimant for a psychiatric evaluation. CX-11, p.140. On March 2, 1999, one day prior to Dr. Robertson's report, Employer filed a notice of controversion, stating " Controverting referral by treating physician until medical evaluation can be obtained. Need to establish connection of alleged psyche claims relating to instant injury of 8/15/98." On the same day, Employer filed a notice of controversion stating: "No further compensation due because Claimant will not participate in curative medical treatment plan." These notices show Employer had notice of Claimant's psychological claim, and that Employer demanded proof of its industrial nature.[22] They do not, however, clearly controvert Claimant's psychological injury. EX-19, p.153. The next notice of controversion, filed March 12, 1999, does not indicate that Employer was denying coverage for Claimant's psychological injury. On the contrary, Employer ordered Claimant to keep his appointment with Dr. Romero to determine the nature of Claimant's injury. EX-19, p.155. That notice states: "Advised by United Back Care Claimant quit clinic today. Will controvert all medical and compensation effective 3-12-99. Will seek reimbursement for $63 monthly metro pass purchased for transportation to/from UBC. Claimant to keep psychiatric IME scheduled for 3-19-99." As of this date, it was still unknown to Employer whether Claimant's injury to his psyche was industrially related. Nor did Employer explicitly controvert Claimant's right to compensation at this time.

Employer did not do so until it filed the final notice of controversion dated September 27, 1999. At this point, Employer controverted all claims made by Claimant, as stated in OWCP's recommendation at Informal Conference, dated September 23, 1999. EX-1, p.1-3. The undersigned therefore finds that Employer is liable for a 10% penalty in accordance with Section 14(e) of the Act for the unpaid installments from March 17, 1999 (14 days after March 3) until September 27, 1999 (date on which Employer filed its notice of controversion). 33 U.S.C. §§ 914(b), 914(d), 914(e).

V. Average Weekly Wage

Employer contends that Claimant's average weekly wage ("AWW") at the time of his industrial injury was $265.65, which is Claimant's annual earnings during the 52-week period leading up to his industrial injury, divided by 52.[23] Claimant argues that his pre-accident earnings are best represented by calculating his daily earnings for the year prior to the accident, as Claimant did not earn his total wages in a year, but over the course of approximately six months.[24] Claimant's calculation yields a daily earning

---

[22]The Court notes that the date on Employer's notice of controversion is one day prior to Dr. Robertson's report, although the stamped filing date was March 5, 1999. EX-19, p.153.

[23]However, Employer fails to include all of Claimant's wages during this one-year period.

[24]Claimant calculated his average daily earnings by subtracting 110 non-working days from 365 days. (52 Saturdays + 52 Sundays + 6 holidays = 110 non-working days.) This gave Claimant a total of 255 working days. He then divided his total earnings of $20,759.54 by 255, giving him a daily

amount of $81.40 a day, giving him an AWW of $569.86. See, ALJX-6, p.3.

Section 10 of the Act sets forth three methods, in subsections 10(a), (b) and (c), for determining a claimant's average annual earnings; that figure is then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods establish a claimant's earning capacity at the time of injury. See *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp*., 8 BRBS 543 (1978).

The calculation methods of Sections 10(a) and 10(b) are applicable where an injured employee's work is regular and continuous. Section 10(a) applies if the employee had worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a); See *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133 (1990). Under Section 10(a), the average weekly wage is calculated by: (1) dividing the total earnings of the claimant during the 52 weeks preceding the injury by the number of days actually worked; (2) multiplying that figure by either 260 or 300, depending on whether the claimant worked a five or six day week; and (3) dividing that figure by 52. See 33 U.S.C. §§ 910(a) and 910(d). Section 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. Only if Section 10(a) or 10(b) cannot "reasonably and fairly be applied" may the administrative law judge ("ALJ") turn to Section 10(c). Section 10(c) does not prescribe a fixed formula but requires the ALJ to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 910(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).

The undersigned finds that Section 10(a) and Section 10 (b) are inapplicable. Section 10(a) and (b) apply when the employee has been working in the "same employment" for "substantially the whole of the year;" however these factors are not present in the instant case. The Board declared that "same employment" for the purpose of Section 10(a) refers to jobs possessing comparable skill levels, experience, and compensation rates. See *Mulcare v. E.C. Ernst Inc.*, 18 BRBS 158, 159-60 (1986). Claimant was a casual longshore worker at the time of his injury. His full-time job was working for a construction company. No evidence was submitted as to the skill levels and experience required to perform construction work, as compared to that of a longshore worker. The undersigned thus finds no evidence to show that Claimant's job as a construction worker was the "same work" within the meaning of the Act.

Section 10(a) also states that "the employee shall have worked in the same employment . . . during substantially the whole of the year immediately preceding the injury. . . ." 33 U.S.C. § 910(a). Assuming, arguendo, that construction and longshore work are the "same work" for purposes of the Act, the question then arises: do Claimant's 22 weeks of full-time construction work during the preceding year constitute

---

earnings of $81.40.

"substantially the whole of the year" within the context of Section 10(a)? The Board has defined substantially less than the whole year as 28 weeks. Therefore, Claimant's 22 weeks as a full-time construction worker does not trigger the application of Section 10(a). See *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977).

The Court further finds that Section 10(b) cannot be reasonably and fairly applied as the record does not contain any evidence regarding earnings of an employee in a situation similar to Claimant. Accordingly, Section 10(b) is not applicable.

Since neither Section 10(a) nor 10(b) can be reasonably or fairly applied in this case, the Court must refer to Section 10(c). The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. See *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). See *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). For the purpose of Section 10(c), a claimant's "wage earning capacity" has been defined as "the amount of earnings the claimant would have had the potential and opportunity to earn absent the injury." *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

Section 10(c) allows the Court to apply any calculation of annual earning capacity when Sections 10(a) and 10(b) cannot be fairly and reasonably applied. One method of calculation explicitly provided for under Section 10(c) is to consider the claimant's actual earnings. See *Hayes v. P&M Crane Co.*, 23 BRBS 389 (1990), *vac'd in part on other grounds*, 24 BRBS 116(CRT) (5th Cir. 1991); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

As the purpose of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury, the Court finds that the most reasonable way to calculate Claimant's actual earning capacity is to add all of Claimant's actual wages during the six months prior to his injury. During this period, between February 15, 1998 and August 15, 1998, Claimant was working full time in construction, as well as working as a casual longshore worker. The testimony by Claimant and both his treating doctors, supports a finding that Claimant regularly worked two jobs at once, and on many occasions, worked as many as 18 hours a day. Dr. Bramhall testified that Claimant sometimes worked "off the books" in addition to his reported employment. Tr.59. This 26 week period also takes into consideration that an individual does not work the entire year without a break. During the first two months of this period, February and March, Claimant's reported earnings show that he was working intermittently. This appears to the Court to reflect Claimant's true earning capacity without injury, and without overcompensating him. "The term 'earning capacity' connotes the potential of the injured employee to earn and is not restricted to a determination based on previous actual earnings." *See Bonner, supra; Barber v. Tri State Terminals, Inc.* 3 BRBS 244 (1976).

In sum, the undersigned finds that the $15,002.59 that Claimant earned for the 26 weeks preceding his industrial injury accurately represents his pre-accident earnings.[25] However, since this calculation should "reasonably represent the annual earning capacity of the injured employee," $15,002.59 must be multiplied by 2 (26 weeks times 2 equals 52 weeks), to arrive at a yearly salary of $30,005.18; this figure is then divided by 52 pursuant to Section 10(d), which produces an average weekly wage of $577.02 and a compensation rate of $384.68. See *Barber, supra; Anderson v. ITO Corp.*, Case 98-LHC-1486 (1999).

VI. Offset

Employer argues that it paid temporary total disability benefits at an inflated rate of $359.63 a week. Employer asserts that the correct compensation rate was $206.01 per week, and claims a credit and offset of $3,969.23, for overpayment made between August 16, 1998 and March 12, 1999.

Section 14(j),[26] of the Act provides, "[i]f the *employer* has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j) (emphasis added). Section 14(j) thus allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. *Balzar* v. *General Dynamics Corp*., 22 BRBS 447, 451 (1989), *on recon.*, aff'd, 23 BRBS 241 (1990). The purpose of Section 14(j) is to reimburse an employer for its advance payments, where these payments were too generous, for however long it takes, out of unpaid due compensation. *Stevedoring Servs. of America* v. *Eggert*, 953 F.2d 552, 556, 22 BRBS 92, 97 (CRT)(9th Cir.), cert. denied, 112 S.Ct. 3056 (1992).

Section 14(j) provides for an offset when the same employer that made the advance payments is later required to compensate an employee under the Act for a work-related injury. In essence, the rationale is that the employer should be reimbursed for compensation it has already paid to the claimant for the subject injury. Under the instant circumstances, however, Employer has miscalculated Claimant's average weekly wage. As already discussed in detail, Claimant's actual average weekly wage was $577.02, giving Claimant a compensation rate of $384.64. Employer has not paid more than it was required, nor has it compensated Claimant to the extent that he is entitled. Employer is therefore not entitled to a credit or offset for overpayment of benefits between August 16, 1998, and March 12, 1999. Employer is, of course, entitled to a credit for benefits already paid, and is subject to the statutory requirement that it pay interest on each unpaid installment of compensation from the date the compensation

---

[25]Earnings from ORM/MOR Staffing, Inc. 2/16/98 – 4/28/98: $ 500.41
Earnings from Hensel Phelps 4/26/98 – 8/15/98: 13,915.27
Earnings from PMA 3/20/98 – 8/15/98: 586.91
Total $15,002.59

[26]Section 14(k) of the 1972 LHWCA was changed to Section 14(j) by the 1984 Amendments. Pub. L. No. 98-426, 98 Stat. 1639, 1649, § 13(b).

became due at the rates specified in 28 U.S.C. §1961.

VII. Section 8(f) benefits

In a footnote, in its Post-Trial Brief, Employer has withdrawn its request for Section 8(f) relief, asserting that there is no basis for a permanent disability.[27] ALJX-4, p.24. At the present time, and until Claimant has reached maximum medical improvement, the issue of Section 8(f) is not ripe for determination.

Conclusion:

Claimant has sustained his burden of proving that the injury to his psyche is of an industrial nature.

Claimant is currently temporarily totally disabled, and remains so until such time as Claimant's treating psychiatrist, Dr. Bramhall, finds Claimant has reached maximum medical improvement.

Accordingly, the Court finds that Employer has accepted responsibility for Claimant's medical treatment up until April 2, 1999. Employer is further responsible for the medical bills of Drs. Bramhall, Worsham, and all other reasonably related diagnostic tests and referrals made after April 2, 1999, and continuing.

Employer is further liable for penalties pursuant to Section 14(e) of the Act, from March 17, 1999, to September 27, 1999.

Claimant's average weekly wage at the time of injury was $577.02, giving him a compensation rate of $384.68.

Employer is not entitled to a credit or offset for overpayment of compensation, but is entitled to a credit for benefits already paid and is subject to payment of interest on all unpaid benefits pursuant to 28 U.S.C. §1961.

The issue of Section 8(f) relief is not ripe for adjudication, as Claimant has not yet reached the point of maximum medical improvement. Furthermore, Employer has withdrawn it's claim for such relief at this time.

ORDER

[27]Employer has, however, reserved its right to do so at a later date. ALJX-4, p.24.

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, the Court issues the following Order:

1. Claimant shall be entitled to temporary total disability benefits for the injury to his psyche and to his lumbar spine. Employer shall pay Claimant for temporary total disability in the amount of $384.68 a week, from August 16, 1998, and continuing, but not to include the weeks that Claimant was temporarily partially disabled.

2. Claimant shall be entitled to temporary partial disability benefits for the following periods: the weeks ending September 11, 1998, September 20, 1998, November 27, 1998, December 4, 1998, December 11, 1998, and the period between the week of December 15, 2000, through the week ending March 9, 2001. [28]

3. Employer shall pay all monies owed to Dr. S. Jeanne Bramhall for psychiatric services rendered to Claimant between April 1, 2001, and continuing.

4. Employer shall pay all monies owed to Dr. Nancy Worsham from May 1, 2001, to present, and including all medical tests and services ordered.

5. Employer shall pay all monies owed for any medical testing or services rendered reasonably related to Claimant's industrial injury from August 15, 1998, to the present, and continuing.

6. Employer shall further pay interest on monies owed to Dr. Bramhall, Dr. Worsham and all other physicians as yet unpaid, at the rate specified in 28 U.S.C. § 1961, computed from the date that each bill was due until the date of actual payment.

7. Employer shall pay Claimant penalties pursuant to Section 14(e) from March 17, 1999, to September 27, 1999.

8. Employer did not overpay benefits between August 16, 1998 and March 12, 1999, and therefore no credit or offset for any alleged overpayment shall be due.

9. Employer is entitled to a credit for benefits already paid.

10. Employer shall pay interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. §1961.

---

[28] See CX-10E, F and G, p. 106-124.

11. The District Director shall make all calculations necessary to carry out this Order.

12. Employer shall provide Claimant all medical care that may in the future be reasonable and necessary for the treatment of the sequelae of the compensable injuries.

IT IS SO ORDERED.

A
Anne Beytin Torkington
Administrative Law Judge